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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. ELISIO VALDEZ, Defendant and Appellant.	C036614 (Super. Ct. No. SF074536A)
THE PEOPLE, Plaintiff and Respondent, v. JOHNNIE RAY PERAZA, Defendant and Appellant.	C037039 (Super. Ct. No. SF074536B)

* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of the Facts and Procedural Background and parts II through XIV.

APPEAL from a judgment of the Superior Court of San Joaquin County, F. Clark Sueyres, Judge. Affirmed in part and modified in part.

Charles M. Bonneau, under appointment by the Court of Appeal, for Defendant and Appellant Elisio Valdez.

Cliff Gardner, under appointment by the Court of Appeal, for Defendant and Appellant Johnnie Ray Peraza.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Senior Assistant Attorney General, Stephen G. Herndon and David Andrew Eldridge, Deputy Attorneys General, for Plaintiff and Respondent.

Defendants Elisio Valdez and Johnnie Ray Peraza were convicted of various crimes, including the murders of Andrea Mestas and her fetus, the premeditated attempted murder of Ronny Giminez, and the false imprisonment and aggravated assault of Nancy Davis. The crimes were committed at separate times and in separate places. The prosecutor theorized that defendants went to Mestas's apartment intending to kill her boyfriend on orders from the Nuestra Familia, a prison gang. The prosecutor also presented evidence that the Nuestra Familia considered Mestas to be a "rat" and a "snitch." As to the motive for the Giminez shootings and the crimes against Davis, who was defendant Peraza's girlfriend, evidence indicated that Peraza was upset because Davis had been seeing Giminez, the father of three of her children.

Defendant Valdez was sentenced to multiple life sentences, plus a determinate term of 11 years and 8 months in prison. Defendant Peraza received multiple life sentences, plus a determinate term of 14 years in prison. On appeal, they raise numerous claims of error.

In the published part of this opinion, we reject defendants' claim that (1) California's murder statute does not apply to the

killing of a fetus that, even absent criminal intervention, would not have survived until birth due to a fatal physical or medical condition, and thus (2) the trial court erred in excluding evidence that Mestas's fetus suffered from such a condition. As we will explain, just as the murder statute protects human beings who are suffering from fatal conditions and have little time to live, it protects fetuses with fatal conditions.

In the unpublished parts of our opinion, we conclude that other contentions also lack merit. However, we shall correct sentencing errors.

FACTS AND PROCEDURAL BACKGROUND*

Defendants' convictions are based upon events that occurred on July 13, 1998. We summarize the facts in the light most favorable to the judgment. (*People v. Mayfield* (1997) 14 Cal.4th 668, 767.)

At about 4:15 a.m., defendant Valdez knocked at the door to Ronny Giminez's apartment. When Giminez opened the door, Valdez asked if he was "Ronny" and whether apartment 3 was for rent. As Giminez looked toward apartment 3, Valdez fired a gun. The bullet missed Giminez but penetrated the ceiling of the apartment. Giminez struggled with Valdez and managed to get the door shut. After police responded to the scene, Giminez identified Valdez as the assailant. However, he recanted the identification at trial.

Around 5:00 a.m., Andrea Mestas's daughter, Angelina, was in the living room of their home when Mestas opened the door and spoke to a man who asked if he could use the telephone. According to Angelina, Mestas said the phone was not working and began yelling, "No, Elisio, no." Angelina then saw defendant

Valdez shoot Mestas twice at close range and run away. A car similar to one owned by defendant Peraza was observed leaving the scene. When officers responded to Angelina's 9-1-1 call, they found Mestas dead, lying face down in her blood. An autopsy revealed that defendant Valdez's gun had been within inches of Mestas's chest when the fatal bullet that perforated her heart was fired. Mestas was pregnant with a 16- to 17-week-old fetus, which perished as the result of Mestas's death.

Shortly before 5:30 a.m., two men in a car similar to one owned by defendant Peraza twice drove by Giminez's apartment. Multiple gunshots fired out of the passenger side of the car riddled the apartment with bullet holes.

At about 7:00 a.m., defendant Peraza came to the apartment of his girlfriend, Nancy Davis, and asked to speak with her. When Davis told Peraza that he was not welcome and refused to let him in, Peraza pulled a firearm from his pants, pointed it at her, and said, "Don't fuck with me." Davis fled to her bedroom, closed the door, and telephoned 9-1-1 to report that Peraza was there with a gun. Peraza forced his way into the bedroom and pulled back the slide of his gun to demonstrate that it was loaded. Outside the bedroom, Davis's sister, Julia Raines, heard the sound of the gun being manipulated and Davis crying. Raines left to get help. Police arrived while defendant Peraza was inside the apartment, holding Davis and her children hostage. Peraza fled by jumping over the backyard fence. He was captured in a building on an adjacent property.

Defendant Peraza's gun was found hidden inside Davis's apartment. A ballistics test revealed that bullets recovered from the scene of the Giminez shootings and the Mestas murder had been fired from Peraza's gun. In Peraza's car, officers discovered an expended shell casing that matched casings found at Giminez's residence.

Davis informed the police that, while defendant Peraza was in her apartment, he told her that he had killed Giminez. Defendant Peraza later told Valdez's brother-in-law, Robert Juarez, that he had murdered Mestas.

DISCUSSION

I

Andrea Mestas was shot in the chest at very close range. A bullet perforated her heart and killed her. During the autopsy, Dr. Sally Fitterer determined that Mestas was 16 to 17 weeks pregnant with a male fetus, which perished as a result of Mestas's death.

In challenging their convictions for murdering a fetus, defendants contend the trial court erred by excluding evidence that, if there were no shooting, Mestas's fetus would not have survived past the second trimester because of a fatal medical condition.

This contention is based on the following evidence that defendant Valdez sought to introduce at trial. Microscopic examination of the placenta revealed areas of "focal necrosis or cell death." Placental autopsy slides were sent to a pathologist, who found considerable chronic inflammation of the implantation site--where the placenta attaches to the uterine wall--as well as acute inflammation of the membranes surrounding the fetus. The pathologist and Dr. Fitterer

opined that the infection made it unlikely the fetus would have survived to term in utero. According to Dr. Fitterer, problems would have developed in the second trimester.

Defense counsel claimed that the Legislature had made a policy decision to protect fetal life because it is "potential life," which necessarily anticipates a live birth. Therefore, counsel argued, if medical evidence showed the fetus would not have survived to term, even absent defendants' criminal intervention, it was not potential life for purposes of a murder charge.

The court ruled that evidence of the medical condition of the fetus was irrelevant and inadmissible because viability is not an element of fetal homicide. (*People v. Davis* (1994) 7 Cal.4th 797, 814-815; Pen. Code, § 187, subd. (a), further section references are to the Penal Code unless otherwise specified.)

On appeal, defendants contend the trial court erred because fetal viability is not the same thing as "survivability," which defendant Valdez defines as meaning the fetus likely would have completed gestation and been born absent the criminal intervention of a third party. Relying on *Roe v. Wade* (1973) 410 U.S. 113 [35 L.Ed.2d 147] and subsequent abortion rights decisions, Valdez reiterates the position he took in the trial court that (1) the Legislature's purpose in protecting fetal life is the protection of "potential human life," and thus (2) if a fetus has no chance of developing until birth, it is not potential life and murder of such a fetus does not fall within the proscription of section 187, subdivision (a).

Valdez even goes so far as to claim that, "if interpreted to apply to the killing of a fetus which is mortally diseased, [the murder statute] violates the cruel and unusual punishment provisions of the state and federal constitutions."

It follows, defendants argue, the court erred in excluding evidence that, even absent defendants' criminal intervention, Mestas's fetus would not have survived until birth.

For reasons that follow, the contentions lack merit, and the proffered evidence was properly excluded.

A

After the California Supreme Court held that the former prohibition against the unlawful killing of a human being did not encompass the murder of a fetus (*Keeler v. Superior Court* (1970) 2 Cal.3d 619), the Legislature amended section 187, subdivision (a), to include the unlawful killing of a fetus. (Stats. 1970, ch. 1311, § 1, p. 2440.) The amended statute reads: "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought." It applies except when the death of the fetus resulted from a lawful abortion. (§ 187, subd. (b).)

The Legislature did not define "fetus" to be the equivalent of "human being," and it did not similarly amend section 192, which defines manslaughter as "the unlawful killing of a human being without malice." Consequently, a fetus is not a human being within the meaning of the murder statute. (*People v. Dennis* (1998) 17 Cal.4th 468, 505.) It is an unborn human offspring in the postembryonic period after major structures have been outlined,

which typically occurs seven or eight weeks after fertilization. (*People v. Davis, supra,* 7 Cal.4th at pp. 810, 814-815.)[1]

Although a fetus is not a human being within the meaning of the murder statute, the Legislature made the policy decision that fetal life is entitled to the same protection as human life, except where the mother's paramount privacy interests are at stake. (*People v. Dennis, supra,* 17 Cal.4th at p. 511; *People v. Davis, supra,* 7 Cal.4th at pp. 803, 809-810.)

In making this policy decision, the Legislature was aware that it could have limited the term "fetus" to "viable fetus," but it did not do so. (*People v. Davis, supra,* 7 Cal.4th at p. 803.) Likewise, the Legislature did not require that, to be covered by the murder statute, the fetus must not be suffering from a fatal condition that would prevent it from developing until birth. Under the plain language of section 187, subdivision (a), fetuses with terminal conditions are nonetheless fetuses protected from an unlawful killing.

Defendants' reliance on *Roe v. Wade, supra,* 410 U.S. 113 [35 L.Ed.2d 147] and its progeny is misplaced because the legal principles in those decisions are inapplicable to a statute that criminalizes the unlawful killing of a fetus without the

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[1] Because the Legislature did not define "fetus" to be the equivalent of "human being," and did not similarly amend section 192, which defines manslaughter as "the unlawful killing of a human being without malice," there is no crime of manslaughter of a fetus. (*People v. Brown* (1995) 35 Cal.App.4th 1585, 1592-1594; accord, *People v. Dennis, supra*, 17 Cal.4th at pp. 505-506.)

mother's consent. (*People v. Davis, supra,* 7 Cal.4th at p. 807.) Moreover, defendants point to nothing in those decisions to support a conclusion that the state's legitimate "interest in protecting *fetal life* or potential life" (*Planned Parenthood v. Casey* (1992) 505 U.S. 833, 876 [120 L.Ed.2d 674, 714]; italics added) does not extend to fetuses with fatal conditions.

Despite statistical evidence disclosing that many fetuses spontaneously miscarry in the early stages of pregnancy (Comment, *Severe Penalties for the Destruction of 'Potential Life' -- Cruel and Unusual Punishment?* (1995) 29 U.S.F. L.Rev. 463, 493-494), the Legislature did not limit the application of section 187, subdivision (a), to fetuses at stages of development that make them statistically more likely to survive until birth.

Instead, as we have noted, the Legislature made the policy decision to protect fetal life in the same manner that it protects human life, except where the mother's paramount privacy interests are at stake. Section 187, subdivision (a), protects human beings who are suffering from fatal conditions and have little time to live. "Murder is never more than the shortening of life; if a defendant's culpable act has significantly decreased the span of a human life, the law will not hear him say that his victim would thereafter have died in any event." (*People v. Phillips* (1966) 64 Cal.2d 574, 579, disapproved on another point in *People v. Flood* (1998) 18 Cal.4th 470, 490, fn. 12; *People v. Moan* (1884) 65 Cal. 532, 537.) It follows that the statute likewise must be construed to protect fetuses suffering from fatal conditions.

B

We reject defendants' claim that murder of a "non-survivable" fetus "is a much less serious offense" than murder of a human being and, thus, construing the murder statute to apply to such a fetus would violate constitutional prohibitions against cruel and unusual punishment.

Although not "cruel or unusual" in its method, a punishment may violate California's Constitution if "it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424, fn. omitted.) Factors relevant to the assessment of such a claim include (1) the nature of the offense and the offender, (2) whether more serious crimes are punished in this state less severely than the offense in question, and (3) whether the same offense is punished more severely in this state than in other jurisdictions. (*Id.* at pp. 425-427.) Defendants focus on the second and third factors.[2]

As to the second factor, their argument is terse. They simply state: "In California, feticide has the same punishment as murder. But killing of a non-survivable feticide [*sic*] is not a comparable

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[2] In passing, defendants assert they did not know Mestas was pregnant when Valdez shot her and, in doing so, murdered her fetus; thus, their "punishment [for feticide] also fails the first prong of the *Lynch* test," i.e., an assessment of the nature of the offense and the offender. (*In re Lynch, supra,* 8 Cal.3d at p. 425.) We address this as-applied factor in part II, *post*.

offense to murder: it is a much less serious offense, because the non-survivable fetus is not a potential human life."

This comparison to the penalty for murder of a human being in California is flawed because defendants underestimate the severity of the murder of a "non-survivable" fetus. As we have pointed out, the state has a legitimate interest in the protection of fetal life. (*Planned Parenthood v. Casey, supra,* 505 U.S. at p. 876 [120 L.Ed.2d at p. 714].) "The fact that the victim murdered is an unborn child does not render defendant less culpable, or the crime less severe, in light of the Legislature's determination that . . . fetuses receive the same protection under the murder statute as persons." (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1240.)

Receiving the same protection under the murder statute means that, just as the state may penalize an act that unlawfully shortens the existence of a terminally-ill human being, it may penalize an act that unlawfully shortens the existence of a fetus which later would have perished before birth due to natural causes. (*People v. Phillips, supra,* 64 Cal.2d at p. 579; *People v. Moan, supra,* 65 Cal. at p. 537.)

Regarding the third factor, defendants' comparison of the punishment for feticide in California to punishments for feticide in other jurisdictions fails to provide any meaningful analysis of those other laws or to demonstrate that they would not apply under the facts of this case. They simply assert "California is unique in imposing murder penalties to the killing of a non-survivable fetus" and, thus, it is excessively harsh to permit a conviction for murdering such a fetus.

This assertion is undermined by our state Supreme Court's observation in *People v. Davis, supra*, 7 Cal.4th 797, that murder statutes in Arizona, Illinois, Louisiana, Minnesota, North Dakota, and Utah, criminalizing the nonconsensual killing of an "unborn child" do not require the unborn to have reached a particular stage of development. (*Id.* at p. 808.) Therefore, California is not as unique as defendants claim.

Moreover, the fact that "California's punishment scheme is among the most extreme does not compel the conclusion that it is unconstitutionally cruel or unusual. This state constitutional consideration does not require California to march in lockstep with other states in fashioning a penal code." (*People v. Martinez* (1999) 71 Cal.App.4th 1502, 1516.) "[T]he needs and concerns of a particular state may induce it to treat certain crimes . . . more severely than any other state. . . . [¶] Whether a particular punishment is disproportionate to the offense is a question of degree. The choice of fitting and proper penalty is not an exact science but a legislative skill involving an appraisal of the evils to be corrected, the weighing of practical alternatives, consideration of relevant policy factors, and responsiveness to the public will. . . . Thus, the judiciary should not interfere in the process unless a statute prescribes a penalty '"out of all proportion to the offense."' [Citation.]" (*People v. Cooper* (1996) 43 Cal.App.4th 815, 827; see also *Harmelin v. Michigan* (1991) 501 U.S. 957, 985-986, 993-994 [115 L.Ed.2d 836, 858-859, 864 (plur. opn. of Scalia, J.); *id.* at p. 1004 [115 L.Ed.2d at p. 871] (conc. opn. of Kennedy, J.) [the Eighth Amendment forbids

only extreme sentences that are grossly disproportionate to the crime].)

As we have noted, our state's Legislature made a policy decision to protect fetal life in the same manner as the life of a human being, except where the mother's paramount privacy interests are at stake. In light of the state's legitimate interest in protecting fetal life, we cannot say that it is grossly disproportionate, or that it shocks the conscience or offends fundamental notions of human dignity, to punish as murder the unlawful killing of a fetus which, due to a physical or medical condition, may not otherwise survive until birth. In other words, construing California's murder statute to apply to the killing of "a non-survivable fetus" does not violate the cruel and/or unusual punishment clauses of the state and federal Constitutions.

C

In any event, defendants did not offer any evidence showing there was no possibility that medical intervention could have prevented the fetus from perishing as a result of the inflammation. Hence, they failed to establish the factual predicate for their legal claim.

II*

Defendants contend that, to convict them of the second degree murder of Mestas's fetus, it was necessary for the jury to find that defendants were aware Mestas was pregnant and, hence, that they harbored malice toward the fetus. In their view, the feticide convictions must be reversed because the jury instructions permitted jurors to convict defendants of "implied malice murder of the fetus"

even if the jurors found that defendants did not know of the existence of the fetus.[3] They point out that Mestas was only 16 or 17 weeks pregnant and that, simply by looking at her, the autopsy physician could not tell she was pregnant. Moreover, in argument to the jury, the prosecutor emphasized an implied malice theory of murder as to the fetus and told the jurors that it was unnecessary for defendants to know Mestas was pregnant; rather, the prosecutor argued, all that was needed to convict defendants on an implied murder theory was an intentional killing of Mestas because this was sufficient to establish the requisite conscious disregard of human life.

In an opinion filed on June 25, 2003, we agreed with defendants that to be convicted of the implied malice murder of Mestas's fetus, they had to have reason to believe Mestas was pregnant. Therefore, we reversed defendants' convictions for murder of Mestas's fetus,

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[3] The trial court defined malice aforethought in pertinent part as follows: "Malice may be either express or implied. [¶] Malice is express when there is manifested an intention unlawfully to kill a human being. [¶] Malice is implied when: [¶] Number one, the killing resulted from an intentional act; [¶] Number two, the natural consequence[s] of the act are dangerous to human life; [¶] And, number three, the act was deliberately performed with knowledge of the danger to and with conscious disregard for human life." (CALJIC No. 8.11.) In addition, the court told the jurors: "Murder of the second degree is also the unlawful killing of a human being when: [¶] Number one, the killing resulted from an intentional act; [¶] Number two, the natural consequences of the act are dangerous to human life; [¶] And, three, the act was deliberately performed with knowledge of the danger to and with conscious disregard for human life. [¶] When the killing is the direct result of such an act, it is not necessary to prove that defendant intended that the act would result in the death of a human being." (CALJIC No. 8.31.)

and also reversed the multiple murder special circumstances findings, because "the court's instructions on implied malice, coupled with the prosecutor's erroneous statements of the law during argument, misled the jurors into thinking they could convict defendants on both murders while finding malice aforethought only as to Mestas's death."

The California Supreme Court granted the People's petition for review and deferred consideration of this cause pending the court's decision on the same issue in *People v. Taylor* (2004) 32 Cal.4th 863 (hereafter *Taylor*). When *Taylor* was decided, the Supreme Court did not see it our way. Instead, *Taylor* held that a person who murders a pregnant woman may be found guilty of implied malice murder of the fetus even if the killer does not know the woman is pregnant. It is unnecessary for the prosecution to demonstrate the killer harbored a conscious disregard for *fetal* life; all that is required is the killer's conduct evinces a conscious disregard for life in general. By intentionally killing the mother, the requisite conscious disregard for life is shown regardless of whether the killer knows the mother is pregnant. (*Id.* at pp. 868-870.)

The California Supreme Court then transferred this matter back to us, with directions to vacate our decision and to reconsider the cause in light of its decision in *Taylor*. We have done so.

Applying the holding of *Taylor* to the facts of this case, as we must (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455), we now reject defendants' claim of error.

In a post-remand supplemental brief, Peraza argues the holding in *Taylor* was predicated on the fact that Taylor fired a gun in an occupied apartment building, which act demonstrated the requisite

conscious disregard for life in general. Here, defendant Valdez shot Mestas at point blank range, which, in defendant Peraza's view, did not show a conscious disregard for life *in general*, only a conscious disregard for Mestas's life.

Peraza misinterprets *Taylor,* which states expressly that "[i]n battering and shooting [the pregnant victim], defendant acted with knowledge of the danger to and conscious disregard for life in general. That is all that is required for implied malice murder. He did not need to be specifically aware how many potential victims his conscious disregard for life endangered." (*Taylor, supra*, 32 Cal.4th at p. 869.) The court's holding was not premised upon the fact that the victim resided in an apartment building where others resided; it simply noted that shooting a woman the killer did not know was pregnant is analogous to shooting through the closed doors of an apartment building. (*Id*. at p. 868.)

Due to this court's clerical error in issuing a remittitur with respect to defendant Peraza while this cause was pending in the California Supreme Court, the trial court resentenced Peraza on February 2, 2004, consistent with our decision filed on June 25, 2003. Peraza now contends that the entry of a new judgment, which does not include a conviction for murder of a fetus, forecloses the reinstatement of the judgment on that conviction. The contention fails because we recalled the remittitur and, in case No. C046195 (*People v. Peraza* (Feb. 4, 2005) [nonpub. opn.]), we vacated the judgment entered on February 2, 2004, and reinstated the judgment entered on September 18, 2000.

III*

Defendant Valdez contends the trial court erred in instructing the jury in the standard language of CALJIC No. 2.51 that motive "is not an element of the crime charged and need not be shown."[4] He claims the court should have given a modified instruction that he requested, which stated in pertinent part: "Except as to the allegations that the defendants committed the crimes charged against them for the benefit of, at the direction of, and in association with a criminal street gang, motive is not an element of the crime . . . ."

According to Valdez, the standard instruction conflicted with the other instructions given regarding the charged offense of participating in a criminal street gang (§ 186.22, subd. (a); CALJIC No. 6.50) and the street gang enhancements (§ 186.22, subd. (b)) charged in connection with other counts, which Valdez says required that he harbor a specific motive. He argues the error was prejudicial because the evidence indicated his crimes may have been motivated by jealousy, rather than a desire to promote his gang, and the absence of the required motive would have been a defense to the gang charges.

Valdez relies on *People v. Maurer* (1995) 32 Cal.App.4th 1121, holding it was prejudicial error to give CALJIC No. 2.51 because

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[4] The court instructed the jury in the language of CALJIC No. 2.51 as follows: "Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. [¶] Presence of motive may tend to establish defendant is guilty. Absence of motive may tend to establish defendant is not guilty."

the charged crime of violating section 647.6 was a "strange beast," in that motive was an element, i.e., the prohibited conduct was *motivated by* an unnatural or abnormal sexual interest with respect to children. (*Id.* at pp. 1126-1127.) That case is distinguishable because, here, motive was not an element of the charged offense or enhancements. (Cf. *People v. Hillhouse* (2002) 27 Cal.4th 469, 504.)

The instruction regarding the charged street gang offense required that Valdez "*willfully* promote[], further[], assist[] . . . any felonious criminal conduct by members of that gang," and the instruction pertaining to the enhancements required that he have "the *specific intent* to promote, further or assist in any criminal conduct by gang members." (Italics added.)

As used in penal statutes, the terms "willful" or "willfully," require only that the illegal act or omission occur "intentionally" without regard to motive. (*People v. Atkins* (2001) 25 Cal.4th 76, 85.) Although certain intents are elements of the substantive crime and the enhancements, *motive* is not an element. Motive and intent "'are separate and disparate mental states. The words are not synonyms. . . .' Motive describes the reason a person chooses to commit a crime. The reason, however, is different from a required mental state such as intent or malice." (*People v. Hillhouse, supra,* 27 Cal.4th at p. 504, citation omitted.)

Therefore, CALJIC No. 2.51 did not conflict with instructions pertaining to the substantive street-gang crime or enhancements. Furthermore, because the challenged instruction stated that motive is not an element of the "charged crime," reasonable jurors would

understand it did not even apply to the street-gang enhancements, which are not crimes. (Cf. *People v. Stanley, supra,* 10 Cal.4th at p. 799 [a reasonable jury would understand that CALJIC No. 2.51 applied to the charged crime of murder and not to the special circumstance allegation, which required that the victim was killed for the purpose of preventing her testimony]; *People v. Noguera* (1992) 4 Cal.4th 599, 637 [same].)

Hence, the trial court did not err in instructing the jury with CALJIC No. 2.51. The fact that Valdez's crimes may have been motivated by jealousy was not a defense to his conviction for violating section 186.22, subdivision (a), as long as he was an active participant in a criminal street gang, he knew the gang engaged in a pattern of criminal activity, and he intentionally committed an act that promoted, furthered, or assisted members of the gang in any felonious criminal conduct.

IV*

Defendant Valdez argues there is no substantial evidence that the attempted murder of Giminez and the subsequent shooting at his apartment were gang-related within the meaning of section 186.22, subdivision (b).

In reviewing the sufficiency of the evidence, we "draw all inferences in support of the verdict that reasonably can be deduced and must uphold the judgment if, after viewing all the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt." (*People v. Estrella* (1995) 31 Cal.App.4th 716, 724-725.) This standard of review is not altered where the People rely

primarily on circumstantial evidence. (*People v. Bloyd* (1987) 43 Cal.3d 333, 346-347.)

The section 186.22, subdivision (b), enhancement is authorized if (1) Valdez's criminal conduct was committed for the benefit of, or in association with, a criminal street gang, and (2) he harbored the specific intent to further or assist in any criminal conduct by a gang member.

Valdez appears to concede that substantial evidence supports the inference he assisted defendant Peraza in retaliating against Giminez because of Giminez's relationship with Peraza's girlfriend, Davis. But he believes the evidence shows only that the offenses were committed due to Peraza's jealousy, and not to benefit the Nuestra Raza gang. According to Valdez, the constitutionality of section 186.22 is compromised if the statute is applied to punish non-gang-motivated activities of persons who are gang members.

The evidence discloses that Peraza was a member of the Nuestra Raza, an affiliate of the Nuestra Familia, and that Valdez was an associate of the gang. Associates commonly assist in the commission of the gang's crimes. Giminez identified Valdez as the person who shot at him, although Giminez attempted to retract the identification at trial. A car similar to Peraza's vehicle was identified as the one used by two men in the drive by shooting at Giminez's residence. Valdez's palm print was found on Peraza's car. Peraza's gun was used in the attack on Giminez and the drive-by shooting, and an expended shell casing matching those found at the crime scene was discovered in his car. Peraza bragged to his girlfriend, Davis, that he killed Giminez.

Testimony also pointed out that it was "dangerous for a woman to be seeing somebody, another man, if she was dating someone from Raza." Such conduct was not tolerated or acceptable. Giminez, who was Davis's former boyfriend and the father of three of her children, had been going out with Davis and was sexually intimate with her during the few weeks prior to the attempt on his life. Armando "Tubby" Posada, a fellow gang member, saw Davis and Giminez together the day before the attempted murder.

From this evidence, a jury reasonably could conclude that Valdez committed the offenses against Giminez to assist Peraza in vindicating his status as a gang member by putting Giminez in his place after he dared to go out with a "Raza's" girlfriend. This inference is supported further by the fact that, after Valdez and Peraza assaulted Giminez, Peraza went to Davis's residence and bragged about the incident -- thereby letting Davis know that her behavior was not without consequences.

In sum, the evidence is sufficient to establish that Valdez acted with the specific intent to further or assist in criminal conduct by a gang member, and that his criminal conduct was committed for the benefit of or in association with a criminal street gang.

V*

Next, defendant Valdez claims he did not receive adequate notice that the prosecution sought to prove counts I through V were committed on behalf of a criminal street gang within the meaning of section 186.22, subdivision (b). When viewed in context, his claim is actually that the trial court erred in

permitting the prosecution to amend the information to conform to proof at trial. Our review discloses no error.

In the first amended complaint, gang enhancements were alleged as to the murder of Mestas (count I), the murder of her fetus (count II), the burglary of Mestas's residence (count III), the premeditated attempted murder of Giminez (count IV), and the discharging of a firearm at an inhabited dwelling (count VI). The complaint also alleged a substantive street terrorism offense (count VII).

Following a preliminary hearing, the magistrate found there was sufficient evidence to hold defendants to answer on the gang enhancements but made the offhand remark, "it looks like the only attack that had a gang purpose was on Ortega."

The prosecutor filed an information changing the shooting at an inhabited dwelling charge to count V and the street terrorism offense to count VI. Immediately following count VI of the information, the prosecutor alleged that, pursuant to section 186.22, subdivision (b)(1), "the above offense was committed by" Valdez for the benefit of a criminal street gang.

After the case went to trial and both sides rested, the prosecutor moved to amend the information, stating that he inadvertently pleaded the gang enhancement applied to the "above offense" when he meant it applied to the "above offenses." Defendant Peraza objected, and Valdez joined in the objection, but neither party articulated any prejudice or sought a continuance. The court permitted the amendment.

The prosecutor may amend an information to conform to proof at trial so long as the amendment does not change the offense charged by the original information to one not shown by evidence taken at the preliminary hearing. (*People v. Winters* (1990) 221 Cal.App.3d 997, 1005; § 1009.)[5] "An amendment may be made even at the close of trial where no prejudice is shown." (*People v. Witt* (1975) 53 Cal.App.3d 154, 165.) The trial court may grant a continuance if the substantial rights of the defendant would be prejudiced by the amendment. (*People v. Winters, supra,* 221 Cal.App.3d at p. 1005; *People v. Witt, supra,* 53 Cal.App.3d at p. 165.) The questions of whether the prosecution should be permitted to amend the information and whether continuance in a given case should be granted are matters within the sound discretion of the trial court and its ruling will not be disturbed on appeal absent a clear abuse of discretion. (*People v. Winters, supra,* 221 Cal.App.3d at p. 1005; *People v. Witt, supra,* 53 Cal.App.3d at p. 165.)

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[5] Section 1009 states in pertinent part: "The court in which an action is pending may order or permit an amendment of an indictment, accusation or information, or the filing of an amended complaint, for any defect or insufficiency, at any stage of the proceedings . . . . [T]he trial or other proceeding shall continue as if the pleading had been originally filed as amended, unless the substantial rights of the defendant would be prejudiced thereby, in which event a reasonable postponement, not longer than the ends of justice require, may be granted. An indictment or accusation cannot be amended so as to change the offense charged, nor an information so as to charge an offense not shown by the evidence taken at the preliminary examination."

Valdez contends that, given the magistrate's comment at the preliminary hearing, he was entitled to conclude from the allegations of the information that the prosecution had elected not to pursue gang enhancements as to the first five counts. He claims he was prejudiced with respect to the crimes involving Mestas and Giminez because "there was a plausible case to be made that the attacks were not motivated by gang affiliation but rather by sexual or romantic jealousy. . . . The defense could have focused more effort on the question of motive, had there been notice that gang motivation was alleged as to each of these counts."

Valdez's appellate claim of prejudicial lack of notice is not persuasive and does not demonstrate an abuse of discretion by the trial court.

When the prosecutor sought to amend the information, Valdez did not seek a continuance or claim that he would suffer any prejudice. The amendment did not change the offense charged by the original information to one not shown by the evidence taken at the preliminary hearing; indeed, the magistrate specifically found there was evidence to support a section 186.22, subdivision (b) enhancement as to each of the offenses in question. And the information alleged that counts I through VI were "connected in [their] commission," which indicated evidence would be produced showing the conduct alleged in those counts was committed for a street gang.

Because count VI would have been established if any one of the first five counts was shown to be gang-related, Valdez was

on notice to defend against evidence that any one of these counts was gang-related. Furthermore, the prosecution's opposition to Valdez's motion to dismiss, which was filed two months after the information, gave Valdez notice that the prosecutor intended the gang enhancement to apply to counts involving Mestas, her fetus, and Giminez (i.e., counts I through V).

Under these circumstances, defendant Valdez had ample notice that the prosecution intended to prove the first five counts were gang-related. Hence, the trial court did not abuse its discretion in permitting the prosecution to amend the information to conform to proof.

VI*

Defendant Valdez claims the trial court erred in instructing the jury with CALJIC No. 3.20 at the request of defendant Peraza's trial attorney and over the objection of Valdez's attorney and the prosecutor.

The challenged instruction was as follows: "The testimony of an in-custody informant, to the extent that it favors the prosecution, should be viewed with caution and close scrutiny. In evaluating this testimony, you should consider the extent to which it may have been influenced by the receipt of or expectation of any benefits from the party calling that witness. This does not mean that you may arbitrarily disregard this testimony, but you should give it the weight to which you find it to be entitled in light of all of the evidence in this case. [¶] 'In-custody informant' means a person, other than a codefendant, percipient witness, accomplice or coconspirator whose testimony is based

upon statements made by a defendant where both the defendant and the informant are held within a correctional institution."

Pursuant to section 1127a, subdivision (b), the first paragraph of this instruction must be given upon the request of a party when an in-custody informant testifies as a witness in a criminal trial or proceeding. The second paragraph of the instruction defines an "in-custody informant" in accordance with subdivision (a) of section 1127a.[6]

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[6] Section 1127a states in pertinent part: "(a) As used in this section, an 'in-custody informant' means a person, other than a codefendant, percipient witness, accomplice, or coconspirator whose testimony is based upon statements made by the defendant while both the defendant and the informant are held within a correctional institution. [¶] (b) In any criminal trial or proceeding in which an in-custody informant testifies as a witness, upon the request of a party, the court shall instruct the jury as follows: [¶] 'The testimony of an in-custody informant should be viewed with caution and close scrutiny. In evaluating such testimony, you should consider the extent to which it may have been influenced by the receipt of, or expectation of, any benefits from the party calling that witness. This does not mean that you may arbitrarily disregard such testimony, but you should give it the weight to which you find it to be entitled in the light of all the evidence in the case.' [¶] (c) When the prosecution calls an in-custody informant as a witness in any criminal trial, contemporaneous with the calling of that witness, the prosecution shall file with the court a written statement setting out any and all consideration promised to, or received by, the in-custody informant. [¶] . . . [¶] (d) For purposes of subdivision (c), 'consideration' means any plea bargain, bail consideration, reduction or modification of sentence, or any other leniency, benefit, immunity, financial assistance, reward, or amelioration of current or future conditions of incarceration in return for, or in connection with, the informant's testimony in the criminal proceeding in which the prosecutor intends to call him or her as a witness."

Here, Robert Juarez, who had been in custody with defendant Peraza a few weeks after the crimes, testified on behalf of the prosecution. In addition to explaining the inner workings of the Nuestra Raza and testifying about the gang's displeasure with Mestas's boyfriend, David Ortega, Juarez stated Peraza told him that he drove defendant Valdez home before the crimes occurred and that Peraza shot Mestas.

Because Juarez met the definition of an in-custody informant, and since Peraza asked for the instruction, the trial court was required to give CALJIC No. 3.20. (§ 1127a, subd. (b).)

Noting that Juarez's testimony was crucial to his defense, Valdez argues that, absent public policy concerns, the testimony of a particular witness should not be singled out for special scrutiny.

However, CALJIC No. 3.20 is supported by a public policy decision made by the Legislature when it enacted section 1127a. As Justice Mosk explained in his concurring opinion in *People v. Jones* (1998) 17 Cal.4th 279: "Our Legislature has recognized the potential unreliability of jailhouse informants' statements, requiring that a jury be instructed about them in cautionary terms on request. (Pen. Code, § 1127a; see also *id.*, § 4001.1.) It enacted the law because '[n]umerous county jail informants have testified to confessions or admissions allegedly made to them by defendants while in custody . . . . Snitches are not persons with any prior personal knowledge of the crime. . . . They testify only that a defendant made an inculpatory statement to them while in proximity in the jail or place of custody. [¶] [Such persons]

gather restricted and confidential information by duplicitous means and thereby lend the credibility of corroboration to wholly fabricated testimony.' (Assem. Com. on Public Safety, Rep. on Assem. Bill No. 278 (1989-1990 Reg. Sess.) as amended May 4, 1989.)" (*People v. Jones, supra,* 17 Cal.4th at p. 323, conc. opn. of Mosk, J.)

Therefore, the Legislature has made the policy decision that defendant Peraza was entitled to the cautionary instruction because Juarez's testimony was based on a statement that Peraza allegedly made to him while Juarez was incarcerated with Peraza. Absent any compelling argument by Valdez persuading us that this policy decision violates his constitutional rights, we are not free to substitute our judgment for that of the Legislature. (*People v. Penoli* (1996) 46 Cal.App.4th 298, 306, fn. 6.)

Valdez attempts to raise such a constitutional claim when he makes the perfunctory assertion that a defendant is denied due process where a jury instruction improperly shifts the burden from the prosecution to the defendant. However, merely asserting that an instruction shifts the burden of proof does not make it so.

"Certainly the instruction by its language neither shifts the burden of proof nor negates the presumption of innocence . . . . It would be possible perhaps as a matter of abstract logic to contend that any instruction suggesting that the jury should [dis]believe the testimony of a witness might in some tangential respect 'impinge' upon the right of the defendant to have his guilt proved beyond a reasonable doubt. But instructions . . . bearing on the weight to be accorded different types of testimony and

other familiar subjects of jury instructions, are in one way or another designed to get the jury off dead center and to give it some guidance by which to evaluate the frequently confusing and conflicting testimony which it has heard. The well-recognized and long-established function of the trial judge to assist the jury by such instructions is not emasculated by such abstract and conjectural emanations from [the defendant]." (*Cupp v. Naughten* (1973) 414 U.S. 141, 148-149 [38 L.Ed.2d 368, 374-375].)

Here, the court instructed the jury fully on the presumption of innocence and the People's burden to prove Valdez's guilt beyond a reasonable doubt. Whatever effect the challenged instruction may have had, it was not of constitutional dimension. (*Cupp v. Naughten, supra,* 414 U.S. at p. 149 [38 L.Ed.2d at p. 375]; see also *People v. Frye* (1998) 18 Cal.4th 894, 958–959.)

Valdez asserts that CALJIC No. 3.20 is not warranted where, as here, the in-custody informant has not received any benefit from the prosecution in exchange for his testimony.[7] We disagree.

Nothing in section 1127a dictates that the instruction not be given where the in-custody informant did not receive any benefit for his or her testimony. Rather, the statute requires the

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[7] Valdez claims Juarez received immunity for his testimony, but that this was not a benefit since Juarez was never charged in this case. The People surprisingly do not dispute that Juarez received immunity; they simply respond "it is sophistry to suggest a grant of immunity is 'not a benefit' unless actually *preceded* by criminal charge." We need not resolve this dispute because the record shows Juarez *did not* receive immunity in exchange for his testimony.

court to give the instruction upon request of a party whenever an in-custody informant testifies as a witness. (§ 1127a, subd. (b).) The presence or absence of any benefit is simply a factor for the jury to consider in assessing the witness's credibility.

That Juarez did not receive any benefit in exchange for his testimony was a factor in defendant Valdez's favor, since this reduced the likelihood Juarez was lying when he claimed defendant Peraza stated that Valdez was not present when Mestas was shot. In fact, Valdez's attorney argued as much to the jury during his summation. The jury's decision not to believe Juarez was more likely due, not to the cautionary instruction, but to Juarez's prior gang affiliations, criminal history, and the fact he is married to defendant Valdez's sister. (See CALJIC No. 2.20.)

Valdez also claims the instruction's prejudicial effect was exacerbated by the trial court's instruction under CALJIC No. 17.32, that "[i]n considering the believability of witness Robert Juarez, you should consider his admission under oath that he lied to you about his participation in certain events earlier in his testimony." The court told the jurors that its comments were advisory only and not binding, and it reminded them they were the exclusive judges of the facts and credibility of witnesses.

Valdez does not dispute that the trial court was entitled to make such comments based on the fact Juarez admitted lying on the stand about his presence at the grocery store when Ortega was assaulted. (*People v. Rodriguez* (1986) 42 Cal.3d 730, 773-774.) He simply asserts the court's comments increased the prejudice occasioned by the *error* in giving CALJIC No. 3.20. However,

because the court did not err in giving the instruction, Valdez's claim of prejudice requires no further discussion.

VII*

At trial, evidence was presented that defendant Peraza was drunk when he left the barbeque shortly before the crimes were committed and was "very drunk" when he arrived at Nancy Davis's home. At the prosecutor's request, the trial court instructed the jury with CALJIC No. 4.21.1, concerning the legal effect of a defendant's voluntary intoxication on his culpability for certain crimes. The text of the instruction is set out in the margin.[8]

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[8] The trial court instructed as follows: "It is the general rule that no act committed by a person while in the state of voluntary intoxication is less criminal by reason of this condition. Thus, in the crimes of 12021[, subdivision](a)(1) of the Penal Code, 245[, subdivision] (a)(2) of the Penal Code, and 236 of the Penal Code, charged in Counts Seven, Eight, Nine and Ten, the fact that defendant was voluntarily intoxicated is not a defense and does not relieve . . . defendant of responsibility for the crime. This rule applies in this case only to those crimes. [¶] However, . . . there is an exception to this general rule; namely, where a specific intent or mental state is an essential element of the crime. [¶] In that event, you should consider defendant's voluntary intoxication in deciding whether defendant possessed the required specific intent or mental state at the time of the commission of the alleged crime. [¶] Thus, in the crimes of 187 of the Penal Code, 187/664 of the Penal Code, 459 of the Penal Code, 246 of the Penal Code, and 186.22 of the Penal Code, and in the allegations under 186.22[, subdivision] (b)(1) and 12022.53[, subdivision] (d), charged in Counts One through Six, a necessary element is the existence in the mind of defendant of a certain specific intent or mental state which is included in the definition of the crimes set forth elsewhere in these instructions. [¶] If evidence shows that defendant was intoxicated at the time of the alleged crime, you should consider that fact in deciding whether or not defendant had the required specific intent or mental state. [¶] If from all the evidence you have a reasonable doubt whether defendant had that

Defendant Peraza argues his trial attorney's performance was deficient for failing to ask the court to supplement or modify the instructions. Noting that the prosecutor presented evidence that either Peraza was the actual perpetrator who murdered Mestas, or that he aided and abetted defendant Valdez in committing this offense and other charged crimes, Peraza points out that voluntary intoxication may negate the premeditation and deliberation required for first degree murder (§ 22, subd. (b)), as well as the intent and knowledge required for aider and abettor liability. (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1131.) In his view, the court's instructions did not make this clear to the jury and, therefore, his attorney was ineffective for failing to ask the court to modify the voluntary intoxication instructions accordingly.

The People simply respond that defense counsel was not deficient for failing to request a pinpoint instruction because (1) CALJIC No. 2.90, the reasonable doubt instruction, apprised the jurors that they must consider all the evidence in determining the truth of the charges, and (2) thus, the jurors necessarily would have known they could affirmatively consider evidence of intoxication as it related to the specific intent required for aiding and abetting liability and as it related to premeditation and deliberation. Accordingly, in the People's view, "Peraza's ineffectiveness claim is worthless."

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specific intent or mental state, you must find that defendant did not have that specific intent or mental state."

Peraza's counsel responds the People's argument "is almost silly." Ordinarily, the use of invectives like "worthless" and "silly" are neither helpful nor professional. Indeed, the People's brief, while often short on substance, contains a number of such invectives. However, Peraza's appellate counsel has a point in characterizing the People's argument as "silly"; as he correctly notes, "the reasonable doubt instruction is good, but it is not that good," i.e., it is not enough to inform the jurors about how they should consider evidence of voluntary intoxication in considering the requisite mental state necessary for conviction.

We conclude that Peraza's trial attorney was not incompetent for failing to request a pinpoint instruction regarding voluntary intoxication, and its effect on premeditation and deliberation, because the court fully apprised the jury of the applicable law and no additional instruction was necessary. (*People v. Castillo* (1997) 16 Cal.4th 1009, 1015.) "'[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.' [Citation.]" (*Id.* at p. 1016.)

In accordance with CALJIC No. 4.21.1, the jury was informed that defendant's intoxication should be considered in determining whether he possessed the specific intent or mental state required for murder, which mental state was set forth elsewhere in the instructions. In addition, the jury was instructed with CALJIC No. 3.31.5 that, regarding the murder count, "there must exist . . . a certain mental state in the mind of the perpetrator" and that the required mental state was "included in the definition

of the crimes set forth elsewhere in these instructions." The definition was provided to the jury through CALJIC No. 8.20, which advised that, for the jury to find defendant guilty of first degree murder, it must find he acted with "willful" premeditation and deliberation. The instruction provided further that "'willful[,]' as used in this instruction[,] means intentional" and that premeditation and deliberation "must have been formed upon preexisting reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation."

Under the instructions given -- which related intoxication to "mental state" -- "[a] reasonable jury would have understood deliberation and premeditation to be 'mental states' for which it should consider the evidence of intoxication . . . ." (*People v. Castillo*, *supra*, 16 Cal.4th at p. 1016; accord, *People v. Hughes* (2002) 27 Cal.4th 287, 342.) Therefore, Peraza's trial attorney was not ineffective for failing to request a modification of the instructions with respect to premeditation and deliberation. (*People v. Castillo*, *supra*, 16 Cal.4th at p. 1018.)

Defendant Peraza's claim concerning the lack of a specific instruction regarding the legal effect of voluntary intoxication on the prosecution's theory that he aided and abetted defendant Valdez in committing most of the crimes is similarly unavailing. Peraza correctly points out that aider and abettor liability requires (1) knowledge of the criminal purpose of the perpetrator, and (2) the intent or purpose of either committing, or encouraging or facilitating the commission of, the offense, and that evidence of his voluntary intoxication is relevant to whether he harbored

the requisite knowledge and intent. (*People v. Mendoza, supra,* 18 Cal.4th at pp. 1123, 1131.) But he has not established that his trial attorney's failure to request additional instructions rendered the attorney's performance prejudicially deficient.

To succeed on a claim of ineffective assistance of counsel, Peraza must show that his trial attorney's action was, objectively considered, both deficient under prevailing professional norms and prejudicial. (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 693-694 [80 L.Ed.2d 674, 693, 697].) To establish prejudice, Peraza must show a reasonable probability that, but for his trial attorney's failings, the result of the proceeding would have been more favorable to Peraza. (*Id.* at p. 694 [80 L.Ed.2d at p. 698]; *People v. Seaton* (2001) 26 Cal.4th 598, 666.)

Thus, Peraza must show that under the instructions as a whole, it is reasonably likely the jury misconstrued the instructions as precluding it from considering the intoxication evidence in deciding aiding and abetting liability. (*People v. Mendoza, supra,* 18 Cal.4th at p. 1134.) If he surmounts this hurdle, he also must demonstrate that it is reasonably probable the error affected the verdict adversely to him. (*Id.* at pp. 1134-1135; *People v. Seaton, supra,* 26 Cal.4th at p. 666.)

The trial court's instructions told the jury the general rule that voluntary intoxication is not a defense applied only to the charged crimes of possession of a firearm by a convicted felon, assault with a deadly weapon, and false imprisonment. The court then specifically instructed "there is an exception to this general rule . . . where a specific intent or mental state is an essential

element of the crime. [¶] In that event, you should consider defendant's voluntary intoxication in deciding whether defendant possessed the required specific intent or mental state at the time of the commission of the alleged crime." The court also gave CALJIC No. 3.01, which told the jurors that, in order to find a person guilty as an aider or abettor, they had to find the person had knowledge of the unlawful purpose of the perpetrator, and had the intent or purpose of committing or encouraging or facilitating the commission of the crime.

Under the instructions as a whole, it is not reasonably likely that the jury believed it was precluded from considering evidence of Peraza's voluntary intoxication in determining whether he "possessed the required specific intent or mental state" for liability as an aider and abettor. Therefore, Peraza's trial attorney was not incompetent for failing to request a pinpoint instruction.

Furthermore, Peraza has failed to show he was prejudiced by the omission. The evidence disclosed that at 1:00 or 2:00 a.m. on the morning of the attempted murder of Giminez, which occurred around 4:15 a.m., and the murder of Mestas, which occurred shortly before 5:00 a.m., defendant Peraza was at a barbeque at Frank Stanich's house. Robert Juarez testified that Peraza told him he had been drinking and was "fucked up" when he left the barbeque shortly before the crimes occurred. But this testimony was impeached by Stockton Police Officer Augustine Telly, who testified that Juarez told him Peraza stated he "wasn't that drunk." Peraza's girlfriend, Nancy Davis, testified he looked "very drunk" when he showed up at her house around 6:50 a.m.; and Davis's sister confirmed that Peraza

appeared to be intoxicated as he was acting "very brave and bold," which he typically did when he had been drinking. However, there was no evidence that Peraza's intoxication affected his mental faculties in a manner that might negate the requisite intent or mental state.

In sum, the evidence did not indicate that, *at the time the crimes occurred*, Peraza was so intoxicated that it prevented him from harboring the knowledge and intent necessary to be guilty of aiding and abetting defendant Valdez in committing those crimes. (*People v. Seaton, supra,* 26 Cal.4th at p. 666.) Thus, even if Peraza's attorney had successfully requested further instructions, it is not reasonably probable that the jury would have concluded that his intoxication prevented him from forming the requisite knowledge and intent. (*Ibid.*)

VIII*

Claiming there was substantial evidence they were intoxicated, as reflected by the trial court's decision to instruct with CALJIC No. 4.21.1, defendants theorize that their intoxication could have negated mental states required for the murder, attempted murder, burglary and shooting at an inhabited dwelling counts (counts I-V). Thus, they believe the court had a duty to instruct sua sponte on certain lesser included offenses.

The fact the trial court instructed with CALJIC No. 4.21.1 does not establish there was substantial evidence that defendants were so intoxicated they could not form the requisite mental states such that the court should have given lesser included offense instructions. (Cf. *People v. Marshall* (1996) 13 Cal.4th 799, 846

["A trial court must instruct on a lesser included offense, whether or not so requested, whenever there is evidence sufficient to deserve consideration by the jury, i.e., evidence from which a reasonable jury composed of reasonable persons could have concluded a lesser offense, rather than the charged crime, was committed"].)

As discussed in part VII, *ante*, the evidence concerning defendant Peraza's intoxication was insufficient to show his mental faculties were affected in a manner that might negate the requisite intents or mental states for the charged offenses. (See *People v. Williams* (1997) 16 Cal.4th 635, 677; *People v. Marshall, supra,* 13 Cal.4th at pp. 847-848; *People v. Greenberger* (1997) 58 Cal.App.4th 298, 378; *People v. Ivans* (1992) 2 Cal.App.4th 1654, 1661-1662.)

The evidence defendant Valdez cites regarding his state of intoxication similarly lacks probative value. He points out there was evidence that he "had a narcotics problem" and that, when he arrived at Leticia Rizo's house approximately *two hours after the commission of the offenses*, he appeared to be wired on crack. But this does not demonstrate that, *at the time the offenses were committed*, he was intoxicated to the extent that it affected his ability to form the requisite mental states. (*People v. Williams, supra,* 16 Cal.4th at p. 677; *People v. Marshall, supra,* 13 Cal.4th at pp. 847-848; *People v. Ivans, supra,* 2 Cal.App.4th at pp. 1661-1662.)

It appears that the trial court gave CALJIC No. 4.21.1 out of an abundance of caution, and that defendants received the benefit of a voluntary intoxication instruction to which they were not entitled. They seek to capitalize on the trial court's largesse

by claiming it proves they were entitled to lesser included offense instructions. Their theory is unavailing. Because there was no substantial evidence that, at the time the offenses were committed, defendants were in such states of intoxication that affected their ability to form the requisite mental states, there was no basis for the court to give lesser included offense instructions. (*People v. Marshall, supra,* 13 Cal.4th at pp. 847-848.)

Defendant Valdez also claims there was substantial evidence that the murders and attempted premeditated murder were committed in the heat of passion, which could have negated the specific intent and premeditation elements of those offenses. He asserts there was evidence he had reason to be angry at Mestas, either from his personal motivation or on behalf of his friend Stanich. And he alludes that the attack on Giminez was motivated by Peraza's jealousy over Davis's relationship with Giminez. In Valdez's view, this evidence establishes that the trial court should have given instructions on the lesser included offenses of voluntary and involuntary manslaughter. We disagree.

To establish that a homicide was committed "upon a sudden quarrel or heat of passion" (§ 192, subd. (a)), there must be evidence that the killer's reason was actually obscured as the result of a strong passion aroused by a provocation that was sufficient to cause an ordinary person of average disposition to act rashly or without due deliberation and reflection, and to act from this passion rather than from judgment. No specific type of provocation is required, and the passion aroused need not be anger or rage. It can be any violent, intense, high-wrought, or

enthusiastic emotion other than revenge. But if sufficient time has elapsed between the provocation and the fatal blow in order for passion to subside and reason to return, the killing is not voluntary manslaughter. (*People v. Breverman* (1998) 19 Cal.4th 142, 163.)

The evidence cited by Valdez discloses that Mestas's boyfriend, David Ortega, asked Mestas if she had "relations" with Valdez. At best, this evidence indicates that *Ortega might have been jealous of Valdez*; but it does not tend to prove that Valdez was jealous of Ortega, or that Valdez was acting under a heat of passion, aroused by this jealousy, at the time he shot Mestas.

In addition, Valdez relies on evidence marginally indicating that gang member Frank Stanich may have been angry about Ortega's relationship with, and alleged mistreatment of, Mestas. Valdez claims this anger "could have been conveyed to the defendants, who shared the anger and acted on it on behalf of Stanich." Valdez also relies on evidence that Nancy Davis believed the assault on Giminez was motivated by defendant Peraza's jealousy concerning Davis's former relationship with Giminez.

Because this evidence does not demonstrate that, when he murdered Mestas and shot at Giminez, Valdez was acting rashly, or without due deliberation and reflection, based on some objectively reasonable passion, it does not support Valdez's contention that lesser included offense instructions were warranted based on heat of passion.

Assuming for the purpose of discussion that heat of passion can be transferred from one person to another, the fact Stanich may have been angry at *Ortega* based on the mistreatment of Mestas does not logically tend to prove that *Mestas* was killed by Valdez in a heat of passion. More importantly, Valdez cites no authority for the proposition that the aroused emotions of Stanich or Peraza are sufficient to demonstrate that Valdez acted under a heat of passion. Rather, the evidence upon which he relies tends at most to prove that Valdez acted out of revenge on behalf of his gang friends. But revenge will never reduce a killing from murder to voluntary manslaughter. (*People v. Breverman, supra,* 19 Cal.4th at p. 163; *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1704.)

In any event, it is not reasonably probable that the jury would have convicted defendants of lesser offenses if the omitted instructions had been given. (Cf. *People v. Coddington* (2000) 23 Cal.4th 529, 593, disapproved on another point in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13; *People v. Breverman, supra,* 19 Cal.4th at pp. 149, 177-178.) This is so because (1) the evidence of intoxication and heat of passion was insubstantial and weak; (2) the jury was told that the charged crimes required a certain mental state or specific intent, which could be undermined by the defendants' intoxication, and that if there was a reasonable doubt regarding whether defendants had formed the requisite intent or mental states, the jury should find the elements lacking and acquit defendants of the charged crimes; (3) the jury also was instructed that, if it found defendants killed Mestas and attempted to kill Giminez under a sudden heat of passion or other condition

that precluded the formation of premeditation and deliberation, then defendants could be convicted of only second degree murder and attempted murder, rather than first degree murder and premeditated attempted murder; and (4) the jury nonetheless returned verdicts convicting defendants of the greater offenses.

IX*

Defendants argue there is insufficient evidence to support their convictions for participating in a criminal street gang in violation of section 186.22, subdivision (a), which requires that they actively participated in a street gang with knowledge that its members engage in a pattern of criminal activity. "Pattern of criminal activity" is defined in subdivision (e) of section 186.22 as the commission of, solicitation of, or conviction of two or more specified predicate offenses.

Defendants assert that, during the evidentiary phase of the trial, the prosecutor neglected to introduce evidence of the second predicate offense, a murder committed on February 2, 1997. Instead, defendants stipulated to this predicate crime after the prosecution and the defense had rested. Defendants note that, rather than presenting this stipulation to the jury before the prosecutor began his closing argument, the court waited until it gave its instructions to advise the jury that defendants had "stipulated to the existence of one such pattern crime."

Defendants' contention is twofold: (1) the court erred in failing to enter a judgment of acquittal on its own motion when the prosecution failed to present the requisite evidence before closing its case-in-chief (§ 1118.1); and (2) there is insufficient

evidence to support the verdict because the stipulation regarding the predicate offense was never presented to the jury during the evidentiary phase of trial. The contention fails for two reasons.

First, the presentation of defense evidence without moving for acquittal waived any claim that the evidence was insufficient at the close of the prosecution's case. (*People v. Smith* (1998) 64 Cal.App.4th 1458, 1468.)

Second, defendants overlook that the record indicates the parties and court were all aware a stipulation would be forthcoming after the close of evidence. As stated by the prosecutor, "except for [a] couple of stipulations that we'll get to, I believe later, the People would rest." Thereafter, certain stipulations were placed on the record before the defense rested, and the court noted the parties would deal with the stipulation regarding the predicate offense later, thereby indicating that it was aware of the nature of the forthcoming stipulation. The parties subsequently discussed an agreement that appears to have been reached earlier between the prosecutor and both defense counsel concerning a stipulation regarding one of the predicate offenses.

The court explained to defendants that their attorneys did not want the prosecutor to put on evidence that certain members of their gang had committed a murder. Thus, counsel had agreed to stipulate that the predicate offense had occurred and, in exchange, the jury would not be told the details of the crime; instead, it simply would be instructed that the parties had stipulated to the existence of one of the predicate crimes. Defendants were informed that, if they did not agree to this stipulation, the prosecutor

would be permitted to reopen and put on evidence proving the crime had occurred. Both defendants agreed to the stipulation, and the court subsequently instructed the jury in accordance with the stipulation.

Under the circumstances, there was no basis for the court to enter a judgment of acquittal on its own motion simply because the prosecutor did not introduce the stipulation during its case-in-chief. Rather, it appears the court was aware that counsel had agreed not to have such evidence introduced by the prosecutor unless defendants would not agree to the stipulation.

Moreover, as the People point out, ample evidence of other qualifying predicate offenses was introduced in the prosecutor's case-in-chief, in addition to the charged crimes, all of which could be used to prove a pattern of criminal activity. (*People v. Gardeley* (1996) 14 Cal.4th 605, 625.) This evidence, which defendants do not attempt to refute, precluded a judgment of acquittal. Contrary to defendants' intimation otherwise, the court was not limited to considering the sufficiency of the evidence regarding the stipulated predicate offense in determining whether the prosecution had presented sufficient evidence to withstand a motion for acquittal at the close of its case-in-chief. (*People v. Mendoza* (2000) 24 Cal.4th 130, 175 [a trial court should deny a motion for acquittal when there is any substantial evidence of the existence of each element of the crime charged].)

Also unpersuasive is defendants' claim that reversal is mandated because the jury was not advised of the stipulation during the evidentiary portion of the trial. They rely on *U.S. v. James*

(9th Cir. 1993) 987 F.2d 648, but in that case the nature of the stipulation was not clear from the record, and the court did not instruct the jury regarding the terms of the stipulation. (*Id.* at pp. 649-651.) Here, the parties agreed the jury simply would be instructed that defendants had stipulated to the existence of one of the predicate crimes and that the details of the crime would be withheld from the jury. Defendants received the benefit of their bargain when the court instructed the jury in accordance with their agreement, and the prosecution did not disclose the nature of the stipulated predicate offense.

Under the circumstances, defendants have no basis to contest the prosecutor's failure to advise the jury of the stipulation or read it to them during the evidentiary portion of the trial. (*U.S. v. Hardin* (11th Cir. 1998) 139 F.3d 813, 816-817; *U.S. v. Branch* (5th Cir. 1995) 46 F.3d 440, 442.) Defendants' stipulation waived the prosecution's burden to introduce evidence of the stipulation and foreclosed a challenge to the sufficiency of the evidence. (*U.S. v. Harrison* (D.C. Cir. 2000) 204 F.3d 236, 242 ["[N]othing in either law or logic compels us to reverse a conviction when the defendant enters into a stipulation on an element and then seeks a windfall from the government's failure to formally read the stipulation to the jury"].)

X*

The trial court instructed the jury that it could find defendant Peraza guilty of the two murders, burglary, attempted murder, shooting at an inhabited dwelling, and street terrorism offenses (counts I-VI) if it found that he aided and abetted the

commission of another offense (i.e., a target crime) and the charged crimes were "a natural and probable consequence of the commission of the target crime." (CALJIC No. 3.02.) However, the court failed to specify any target crimes for the jury.

Peraza points out it is error for the trial court to neglect to instruct on a target offense because this gives rise to a "risk that the jury will 'indulge in unguided speculation' [citation] in making the requisite factual findings." (*People v. Prettyman* (1996) 14 Cal.4th 248, 272.) Reversal is required if the record discloses there is a reasonable likelihood that the instruction led the jury to misapply the doctrine of natural and probable consequences. (*Id.* at pp. 272-273.) Two important factors in our prejudicial error analysis are whether the natural and probable consequences theory was argued to the jury, and whether there was evidence presented of any other target crimes. (*Ibid.*)

Peraza concedes that no one argued a natural and probable consequences theory to the jury. Nevertheless, he believes the court's error was prejudicial because the prosecution presented evidence of other crimes against him, namely the charged offenses of possession of a firearm by a convicted felon, the assault upon Davis with a deadly weapon, and the false imprisonment of Davis by force or violence (counts VIII-X). We are not persuaded.

Peraza fails to provide any meaningful analysis demonstrating how the jury could find that counts I through VI were natural and probable consequences of the commission of counts VIII through X, which occurred *after* the commission of counts I through VI. He simply asserts it is possible. This is not sufficient to

establish that he suffered any prejudice from the trial court's instructional error. (Cf. *People v. Waidla* (2000) 22 Cal.4th 690, 737 [rejecting a similar claim raised in a perfunctory fashion]; *People v. Hardy* (1992) 2 Cal.4th 86, 150 [a reviewing court need not address appellate contentions mentioned briefly without supporting argument]; *People v. Coley* (1997) 52 Cal.App.4th 964, 972 [appellant bears the burden of showing error and resulting prejudice else his argument is waived].)

In his reply brief, Peraza baldly asserts there was evidence of other crimes, aside from the charged offenses, which could have been viewed as target offenses by the jury. Again, he fails to provide any meaningful analysis explaining how a reasonable jury could find the crimes charged in counts I through VI were a natural and probable consequence of those offenses. Moreover, he fails to cite to any evidence demonstrating that he aided and abetted those other crimes, which is a prerequisite to the jury using them as target offenses under the instructions given by the court. Hence, this contention requires no further discussion. (*People v. Waidla, supra,* 22 Cal.4th at p. 737; *People v. Hardy, supra,* 2 Cal.4th at p. 150; *People v. Coley, supra,* 52 Cal.App.4th at p. 972.)

XI*

Defendant Peraza contends the trial court violated his state and federal constitutional rights by instructing the jury with CALJIC No. 17.41.1, which he refers to as the "juror snitch instruction." He concedes that a similar claim was rejected by the California Supreme Court in *People v. Engelman* (2002) 28 Cal.4th 436, and that we are bound by this decision. (*Auto*

Equity Sales, Inc. v. Superior Court, supra, 57 Cal.2d at p. 455.)

Peraza submits the issue solely for purposes of preserving the matter for any subsequent federal review. Accordingly, the contention requires no further discussion.

XII*

The reporter's transcript discloses the trial court correctly instructed the jury in language of CALJIC No. 8.80.1 in pertinent part as follows: "If you find that a defendant was not the actual killer of a human being or if you are unable to decide whether defendant was the actual killer or an aider and abettor, you cannot find the special circumstance to be true as to that defendant unless you are satisfied beyond a reasonable doubt that such defendant with the intent to kill aided and abetted or assisted any actor in the commission of the murder in the first degree."

However, the clerk's transcript contains two written versions of CALJIC No. 8.80.1, only one of which comports with the version given orally to the jury. The other written version is identical to the instruction given by the court except it adds the incomplete phrase "or with reckless indifference to human life and as a major participant aided and abetted" immediately after the above-quoted portion of CALJIC No. 8.80.1.

Defendant Peraza contends the latter instruction is erroneous because it advised the jurors that they could find the special circumstance to be true if they found Peraza aided and abetted a murder with reckless indifference to human life, rather than requiring them to find that he aided and abetted the actual killer

with the intent to kill, as required by section 190.2, subdivision (c).[9]

He argues that since the incorrect instruction is part of the certified clerk's transcript under the heading "Instructions Given," and because we must presume official duty was correctly performed (Evid. Code, § 664), we must presume the clerk's transcript correctly reflects that the jury was given the incorrect written version of the instruction in addition to the correct version. We disagree.

Because they include numerous interlineations and reflect who requested them, the written instructions in the clerk's transcript appear to be rough drafts rather than final, sanitized instructions eventually given to the jury. It is readily apparent that the correct written version of CALJIC No. 8.80.1 is a photocopy of the incorrect version, with the only difference being an interlineation deleting the language about which Peraza complains. This indicates that the court discovered the error prior to instructing the jury. Under the circumstances, we presume official duty was correctly performed and the court gave the jury only the correct written instruction, which comported with the court's oral instructions.

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[9] Section 190.2, subdivision (c) states in pertinent part: "Every person, not the actual killer, who, with the intent to kill, aids, abets, counsels, commands, induces, solicits, requests, or assists any actor in the commission of murder in the first degree shall be punished by death or imprisonment in the state prison for life without the possibility of parole . . . ."

This presumption is supported both by the fact that the court read CALJIC No. 8.80.1 to the jury only once rather than twice, as would be expected if there were two final copies of the written instructions, and by the fact that the jury did not question the court about which instruction applied, as it presumably would have done if there was a conflict in the written instructions.

Peraza has failed to establish that any instructional error occurred. (*People v. Clifton* (1969) 270 Cal.App.2d 860, 862 [error is never presumed, and it is the appellant's burden to present a record showing it; any uncertainty in the record in that respect will be resolved against him].)

XIII*

Defendant Peraza's last contention is that the trial court violated his state and federal constitutional rights to counsel and due process by restraining him in a leg brace without a showing of need and without considering less restrictive alternatives.

Generally, there must be a manifest need for physical restraints, which may not be imposed absent a showing of violence, a threat of violence, or other nonconforming conduct that would disrupt the judicial process if defendant were not restrained. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1215; *People v. Duran* (1976) 16 Cal.3d 282, 290-292, fn. 11.) Shackling is discouraged because it may impair a defendant's ability to participate in the defense and may cause prejudice in the minds of the jurors. (*People v. Duran, supra*, 16 Cal.3d at pp. 290-291; accord, *People v. Mar* (2002) 28 Cal.4th 1201, 1216.) The trial court's decision

to use physical restraints is reviewed for abuse of discretion. (*People v. Jackson, supra*, 13 Cal.4th at p. 1215.)

Prior to trial, defendant Valdez's attorney sought to preclude the shackling of his client. The trial court stated it had not heard a basis for shackling defendants and, unless and until such evidence was presented, defendants would not be visibly shackled. However, because defendants had to be brought to court through a public hallway, rather than a secure corridor, they would have to wear a non-visible leg brace. The court described the brace as one that fits under a defendant's pants and would allow him to bend his legs, but would lock in a straightened position if he fully extended his legs in an attempt to run. Neither defense counsel voiced any objection to the court's decision.

Peraza claims the court abused its discretion because the record is devoid of any evidence of violent or disruptive conduct by him. He emphasizes that the court stated there was "no basis to shackle the defendants." He concedes the leg brace was not visible to the jury, but argues it necessarily "materially altered his ability to communicate with his counsel and assist in his defense."

The People respond that, because he failed to make such an objection in the trial court, Peraza has waived his claim that the leg brace violated his constitutional rights. (Citing *Estelle v. Williams* (1976) 425 U.S. 501, 504-505 [48 L.Ed.2d 126, 130-131]; *People v. Chacon* (1968) 69 Cal.2d 765, 778.)

For the following reason, we need not determine whether the trial court abused its discretion in shackling defendant or

whether defendant waived his claim of error by failing to object to wearing restraints.

"No basis for reversal appears [where] the record contains no hint that physical restraints impaired the fairness of defendant's trial and thus caused prejudice." (*People v. Anderson* (2001) 25 Cal.4th 543, 596 [the California Supreme Court has "consistently held that courtroom shackling, even if error, was harmless if there is no evidence that the jury saw the restraints, or that the shackles impaired or prejudiced the defendant's right to testify or participate in his defense"]; *People v. Coddington, supra,* 23 Cal.4th at pp. 650-651; *People v. Majors* (1998) 18 Cal.4th 385, 406; *People v. Tuilaepa* (1992) 4 Cal.4th 569, 584; *People v. Cox* (1991) 53 Cal.3d 618, 652-653.)

Such is the case here. Defendant did not testify at trial, and "there is no evidence or claim his restraints influenced him not to do so. Moreover, the court ordered that the only restraining device would be a leg brace concealed under defendant's trousers; there is no evidence or claim the jury ever saw the brace. Hence, we have no basis to find that prejudice arose." (*People v. Anderson, supra,* 25 Cal.4th at p. 596.)

Peraza's claim that the leg brace necessarily interfered with his right to counsel is not persuasive. In effect, he asks us to assume his restraints affected his ability to communicate with his attorney and assist in his defense. This is insufficient to establish constitutional error and prejudice. (*People v. Pride* (1992) 3 Cal.4th 195, 233-234.)

XIV*

The People correctly contend that the section 186.22, subdivision (b)(1), sentence enhancements on the murders and attempted murder (counts I, II, and IV) should be stricken and, in their place, a minimum parole eligibility date should be imposed (§ 186.22, subd. (b)(5)) because those convictions are for offenses punishable by life imprisonment. (*People v. Lopez* (2005) ___ Cal.4th ___ [2005 Cal.LEXIS 14]; *People v. Ortiz* (1997) 57 Cal.App.4th 480, 485-486 [section 186.22(b)(1) enhancement does not apply to murder punishable by an indeterminate life sentence]; see also *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1465 [enhancement does not apply to attempted premeditated murder punishable by life in state prison].)

Accordingly, we shall modify the judgment by striking those enhancements imposed on counts I, II, and IV and, instead, imposing the minimum parole eligibility date.

The People also contend the trial court erred in staying the section 12022.53, subdivision (d) enhancement on defendant Valdez's fetal murder conviction because the court believed that imposition of the enhancement on both counts I and II violated principles of due process. The People are correct. Multiple enhancements under subdivision (d) of section 12022.53 are permissible for a single firearm use involving multiple victims, even if only *one* victim is injured. (*People v. Oates* (2004) 32 Cal.4th 1048, 1061-1062, 1065-1068.) Here, Valdez's use of a firearm injured *two* victims; he killed Mestas and her fetus. Hence, the trial court erred in staying the enhancement on count II.

The People assert, and defendants do not dispute, that the court erred in awarding defendants 123 days of presentence conduct credits. The People correctly point out that section 2933.2, subdivision (c), precludes defendants from receiving any presentence conduct credits because they were convicted of murder. (*People v. McNamee* (2002) 96 Cal.App.4th 66, 73-74.) Accordingly, we shall strike the presentence conduct credits.

In one sentence in a footnote, unsupported by any analysis or meaningful citation to authority, the People assert that the execution of punishment imposed on count VI for participation in a criminal street gang (§ 186.22, subd. (a)) "probably should be stayed" pursuant to section 654, in light of the unstayed execution of punishment on counts I, II, IV, and V. If they are implying that defendants may not be punished pursuant to section 186.22, subdivision (a), because their punishment for those other crimes was enhanced pursuant to section 186.22, subdivision (b), the People are wrong. (*People v. Herrera, supra,* 70 Cal.App.4th at pp. 1467-1468.)

In the supplemental brief that we directed the People to file regarding whether defendant Peraza was prejudiced by the trial court's instructions and the prosecutor's argument concerning the fetal murder charge, the People included an additional claim of sentencing error. Our request for supplemental briefing did not invite the People to address any other issues, and they did not file an application seeking leave to submit additional briefing on their claim of sentencing error.

This is not the appropriate method of seeking leave to file a supplemental brief on additional issues. (Cal. Rules of Court, rule 13(a)(4).) Under the circumstances, the People's additional claim of error is not cognizable and we decline to address it.

DISPOSITION

The judgments imposed on September 18, 2000, are modified as follows: (1) the section 186.22, subdivision (b)(1) sentence enhancements on the murders and attempted murder convictions (counts I, II, and IV) are stricken and 15-year minimum parole eligibility terms are imposed instead (§ 186.22, subd. (b)(5)); (2) the stay of the section 12022.53, subdivision (d) enhancement on the fetal murder conviction (count II) is vacated; and (3) the award of 123 days of presentence conduct credits is stricken. As modified, the judgments are affirmed.

The trial court is directed to amend the abstract of judgments to reflect these modifications, and to forward certified copies of the amended abstracts to the Department of Corrections.

SCOTLAND, P.J.

We concur:

DAVIS, J.

RAYE, J.